

LaFORREST BRITT
Claimant

BOEING MILITARY AIRPLANES

AETNA CASUALTY & SURETY COMPANY
Insurance Carrier

KANSAS WORKERS COMPENSATION FUND

ORDER

APPEARANCES

RECORD & STIPULATIONS

ISSUES

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the whole record and considering the arguments of the parties, the Appeals Board finds and concludes as follows:

The Administrative Law Judge found that the claimant was entitled to permanent partial general disability benefits based on evidence proving a work disability in the amount of forty-five percent (45%). Respondent and the Fund stipulated that if any benefits were awarded in this matter that the respondent and the Fund would share liability equally. Both appeal, questioning the Administrative Law Judge's Award entitling the claimant to a work disability. The respondent and the Fund both present essentially the same arguments as to why work disability is inappropriate. Accordingly, only the respondent's arguments will be discussed in this Award.

Respondent challenges the Administrative Law Judge's award of work disability, arguing that the presumption of no work disability contained in K.S.A. 1991 Supp. 44-510e(a) applies to this case. Respondent contends that the evidentiary record contains facts that establish that the claimant is physically able to return to his former position as a sheet metal mechanic with respondent. The respondent argues that the claimant cannot avoid the presumption of no work disability by refusing to engage in work at a comparable wage where the proffered job is within the worker's ability. See Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 284, 887 P.2d 140 (1994), rev. denied 257 Kan. ____ (1995). Respondent further argues that since the claimant voluntarily resigned his job with respondent, he effectively deprived the respondent of an opportunity to place him in work at a comparable wage.

Claimant counters, arguing that the Administrative Law Judge's decision awarding work disability should be affirmed as the presumption of no work disability does not apply because the claimant is not earning a comparable wage. The claimant contends that the Foulk case does not apply to the facts of the case at hand, because the claimant was never offered an accommodated position that he was physically able to perform. Claimant also asserts that he was forced to resign his employment with the respondent because temporary total disability benefits were terminated without good cause which forced him to return to Atlanta, Georgia, in order to receive assistance from his family.

Claimant first injured his low back while working for the respondent on April 5, 1989. After that injury, claimant received treatment at Boeing Central Medical on a regular basis as his work activities were aggravating his back condition from April 5, 1989 until he was taken off work on March 2, 1992. Claimant also received outside medical treatment from orthopedic surgeons, Doctors Toohey, Marsh and Bartal and Dr. Snyder, a neurosurgeon. In 1991 Dr. Snyder kept the claimant off work for six (6) months for treatment of a bulging disc. At the suggestion of his supervisor, claimant also received treatment from a chiropractor in an attempt to obtain relief from the continuing back pain. Claimant was able to continue to perform his regular job duties as a sheet metal mechanic until November 1991 when he was placed in the work pool for light-duty work. His regular job as sheet metal mechanic required claimant to repetitively bend and twist; do heavy overhead lifting; and, to stand on his feet the entire shift.

While working in a work pool on March 2, 1992, claimant was moving cabinets in an office with a fellow employee when he again hurt his back. At that time, Dr. Snyder took claimant off work and as a result of being off work he received temporary total disability compensation benefits. However, toward the end of May 1992, respondent's insurance carrier terminated these weekly benefits. Due to claimant's wife being laid off and also

termination of his temporary total disability benefits, claimant and his family had to move to Atlanta, Georgia, where they were able to obtain financial assistance from other family members. Prior to this move, claimant voluntarily terminated his employment with respondent.

Claimant returned to Wichita, Kansas, on October 15, 1992, for a preliminary hearing requesting medical treatment and temporary total disability benefits. The Administrative Law Judge, as a result of that hearing, ordered respondent to provide claimant with medical treatment with Dr. William Cabot, an orthopedic surgeon in Atlanta, Georgia, and ordered temporary total disability benefits paid from May 28, 1992 through September 2, 1992, with further temporary total disability benefits to be paid if Dr. Cabot took the claimant off work.

Dr. Cabot commenced treating claimant's low back condition on November 3, 1992, prescribing conservative treatment. However, due to claimant's continuing symptomatology, Dr. Cabot referred claimant to one of his associates, Dr. Lawrence Schlacter, a neurosurgeon, for evaluation. Dr. Schlacter determined that surgery was necessary and performed a discectomy on February 6, 1993. Claimant was then followed by Dr. Cabot, who was prescribing pain medication for the claimant as late as December 6, 1994. Dr. Cabot testified that he discharged claimant from active treatment on August 26, 1994, opining that claimant's functional impairment as a result of his low back injury was twelve percent (12%) of the whole body. Dr. Cabot placed a basic restriction on the claimant of occasional and frequent lifting up to thirty-five (35) pounds. After review of claimant's job description, Dr. Cabot was of the opinion that claimant was capable of performing this job. On cross examination, Dr. Cabot testified that in addition to the thirty-five (35) pound lifting restriction, he would restrict the claimant to alternating between standing and sitting; limited stooping and twisting; and, limited lifting while bending or stooping to fifteen (15) pounds.

At the request of claimant's attorney, he was examined and evaluated by Lawrence Blaty, M.D., board-certified in physical medicine and rehabilitation, on March 30, 1994. Dr. Blaty's assessment of the claimant was status post-lumbar discectomy with residual right leg radiculopathy. In accordance with the AMA Guides, Dr. Blaty opined that claimant had a twenty-four percent (24%) permanent partial impairment to the whole body. Dr. Blaty placed permanent restrictions on the claimant of limiting his lifting to no more than thirty (30) pounds occasionally; no lifting while bending; occasional bending or twisting activities; occasional squatting or kneeling; no crawling; and, alternating between sitting and standing at thirty (30) minute intervals. Dr. Blaty reviewed the claimant's job description and opined that the claimant could not perform these job duties because he was required to perform constant standing and walking activities.

Two vocational experts, Jerry Hardin for the claimant and Karen Terrill on behalf of the respondent, testified in this case on the issue of work disability. Utilizing the restrictions of both Dr. Blaty and Dr. Cabot, Mr. Hardin was of the opinion that claimant had a forty to forty-five percent (40-45%) loss of ability to perform work in the open labor market. In regard to loss of ability to earn comparable wage, again using the restrictions of both Dr. Cabot and Dr. Blaty, Mr. Hardin opined that claimant had a sixty-nine percent (69%) comparable wage loss. On the other hand, Ms. Terrill's opinion concerning loss of claimant's ability to perform work in the open labor market was forty-six percent (46%) when she used Dr. Blaty's restrictions and thirty-four percent (34%) using Dr. Cabot's restrictions. Ms. Terrill only considered Dr. Cabot's lifting limit of up to thirty-five (35)

pounds on an occasional and frequent basis in her loss of labor market opinion. With respect to loss of comparable wage, Ms. Terrill opined that claimant had a zero percent (0%) loss of comparable wage based on Dr. Cabot's opinion that the claimant was able to perform his post-injury job.

The Appeals Board finds that claimant's testimony, coupled with Dr. Blaty's opinions, establishes that claimant is not physically able to return to his previous job with the respondent as a sheet metal mechanic. The evidentiary record is also void of any evidence that the respondent offered the claimant an accommodated job within the claimant's permanent restrictions. Accordingly, the Appeals Board finds that the Foulk decision does not apply to the facts of this case. Since the claimant was not offered a job by the respondent that he had the ability to perform at a comparable wage, the presumption of no work disability contained in K.S.A. 1991 Supp. 44-510e(a) does not apply. Claimant is therefore eligible for a work disability award. The Administrative Law Judge found that claimant was entitled to a permanent partial general disability of forty-five percent (45%) based on work disability. The Administrative Law Judge made this finding by considering the comparable wage loss opinions of the vocational experts but decided that the loss of claimant's ability to perform work in the open labor market of forty-five percent (45%) best represented the claimant's work disability. See Schad v. Hearthstone Nursing Center, 16 Kan. App. 2d 50, 816 P.2d 409, rev. denied 250 Kan. 806 (1991). Although the Appeals Board would have considered both the comparable wage loss prong and the labor market loss prong in determining work disability, the Appeals Board finds that the appropriate percentage of work disability in this case would have been somewhere in the forty to fifty percent (40-50%) range. The Appeals Board, therefore, affirms the Administrative Law Judge's forty-five percent (45%) finding as it falls within the appropriate range of work disability.

All other findings and orders of the Administrative Law Judge in his Award of March 13, 1995, are incorporated herein and are made a part hereof as if specifically set forth in this Award to the extent that they are not inconsistent with the findings and conclusions expressed herein.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark, dated March 13, 1995, should be, and hereby is, affirmed as follows:

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN FAVOR of the claimant, LaForrest Britt, and against the respondent, Boeing Military Airplanes, and its insurance carrier, Aetna Casualty & Surety Company, and the Kansas Workers Compensation Fund for an accidental injury sustained on March 2, 1992, based on an average weekly wage of \$817.96.

The claimant is entitled to 101.71 weeks temporary total disability at the rate of \$289.00 per week or \$29,394.19, followed by compensation at \$245.39 per week not to exceed \$100,000.00 for a 45% permanent partial general body disability.

As of September 29, 1995, there would be due and owing to the claimant 101.71 weeks temporary total disability compensation at the rate of \$289.00 per week or \$29,394.19, plus 84.86 weeks permanent partial compensation at \$245.39 per week in the

sum of \$20,823.80, for a total due and owing of \$50,217.99, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of \$49,782.01 shall be paid at \$245.39 per week until fully paid or until further order of the Director.

All workers compensation benefits and expenses incurred by claimant as a result of his accidental injury shall be awarded to be paid equally by the respondent and Fund as stipulated.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed against the respondent and Fund to be paid directly as follows.

Barber & Associates	
Transcript of Regular Hearing	\$249.10
Alexander Reporting Co.	
Deposition of Lawrence R. Blaty, M.D.	\$280.20
Deposition of Jerry D. Hardin	\$250.60
Deposition Services	
Deposition of Jan Schaefer	\$358.60
Deposition of Karen Terrill	\$262.80
Brentano Reporters, Ltd.	
Deposition of William D. Cabot, M.D.	Unknown

IT IS SO ORDERED.

Dated this ____ day of October 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Joseph Seiwert, Wichita, KS
Vaughn Burkholder, Wichita, KS
Scott Mann, Hutchinson, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director